

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. *K.J. Valsala Kumari, Joint Commissioner (General), O/o. CCT, Tvpm.*
2. *T.V. Kamala Bai, Joint Commissioner (Law), O/o. CCT, Tvpm.*
3. *S.K. Suchala Kumar, Joint Commissioner (Audit & Inspection), O/o. CCT, Tvpm.*

Sub :- KVAT Act, 2003 - Clarification U/s 94 - Rate of tax on the product
Musli Power X-tra - Orders issued.

Read :- Application from Sri. K.C. Abraham, M/s. Kunnath Pharmaceuticals,
Muvattupuzha dated 11/7/2012.

ORDER No.C3/23413/12/CT DATED 28/11/2012.

1. Sri. K.C. Abraham, M/s. Kunnath Pharmaceuticals, Muvattupuzha has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification on the rate of tax of Musli Power X-tra.

2. The applicant is manufacturing and selling Musli Power X-tra, an ayurvedic medicine in capsule form required for internal consumption which has been approved for gynaec problems to get pregnancy and to improve the sperm count for couples suffering from impotency and other sexual dysfunctions. The applicant would contend that it is an Ayurvedic Patented medicine with Patent No. 241602 issued to treat sexual dysfunctions.

3. The Intelligence Officer (Investigation Branch), Mattancherry at Aluva classified the above Ayurvedic Medicine as food supplements taxable at 12.5% for 2006-07 and imposed penalty.

4. The applicant would contend that a patented medicine cannot be treated as food supplement or cosmetics attracting RNR rates. The Controller of Patents is a statutory body constituted under the provision of the Patents Act, 1970. Therefore nobody can question and discard the Certificate issued by this competent authority on flimsy grounds. The Intelligence Officer, Mattancherry had imposed penalty relating to the year 2005-06, though remanded in appeal by the first Appellate Authority, fixing the tax only at 4% applicable to medicines. Therefore this is only a difference of opinion, without any change in the schedule to the KVAT Act, 2003 regarding the rate of tax, which require clarification from the Authority.

5. The applicant has produced a copy of the Form 26-D (Renewal of License) to manufacture for sale of Ayurvedic/ Siddha /Unani drugs issued by the Deputy Drugs Controller (Ayurveda and Licensing Authority). The applicant would contend that it is evident that they are manufacturing Musli Power X-tra which the applicant contends that has been explained as Medicaments of Ayurvedic Systems with HSN Code 3004.90.11 vide Entry 8(h)(i) of Serial No.36 of Third Schedule to KVAT Act, 2003.

6. The applicant would also contend that the Hon'ble High Court of Kerala had already directed the Government to take a decision regarding the manufacture for sale or distribution of the drug Musli Power X-tra in W.P.(C) No.11410/2011 vide judgment dated 27/6/2011 and, again the Hon'ble Division Bench of the Hon'ble High Court of Kerala in W.P.(C) No.1864/2012 had issued an interim order dated 23/1/2012 allowing to advertise the product since the Department had renewed the licence with condition that the applicant should not advertise the product - since medicine - in any means including Electronic Media.

7. The applicant would contend that they are manufacturing a patented ayurvedic medicine with valid Drug License under the provisions of Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945 for the purpose of manufacture and free sale of the ayurvedic product Musli Power X-tra. The applicant contends that the case of the Officer of the Department is that there were five ingredients to be used for manufacture when license was granted and thereafter four more ayurvedic ingredients were added and hence violated the Rules of Drugs and Cosmetics Act. Secondly the Officer observed that Entry 36 of the Third Schedule does not include food or beverages such as dietetic, diabetic or fortified food, food supplement, tonic beverages, aqueous distillates or aqueous solutions of essential oils suitable for medicinal use, soap or other products containing added medicament and blood albumin not prepared for therapeutic or prophylactic use. The Officer had also relied on the case of Sreedhareeyam Ayurvedic Medicines Pvt. Ltd. & Ors. Vs. State of Kerala (2011) 19 KTR 561 Ker and also the case of Narasimha Capsule.

8. The applicant would contend that the answer to the first query is clearly explained under Entry 36 (7) & (8) of the Third Schedule and therefore the finding on that score is against the declaration in the respective Schedule. The second aspect which the Officer relied is that the impugned product is not an ayurvedic medicine covered by Entry 36 but is in the nature of food supplement without any specific use for any disease whether as therapeutic or prophylactic and hence taxable at 12.5% under S.R.O. No. 82/2006.

9. The applicant contends that while considering the judgment and Rules of Interpretation, the Officer failed to consider the Kerala Finance Act, 2011 through which the Government have fixed the tax rate at 4% only from 1/4/2005 to 12/11/2009. Evidently if the medicament is having any subsidiary therapeutic or prophylactic use, if it is manufactured under Drug License it will attract tax only at 4% from 1/4/2005 to 12/11/2009. Therefore the aspects relied to fix the tax rate at 12.5% is against the provisions of the Kerala Value Added Tax Act, 2003 prevailed at the relevant period. The said proviso was added before judgment in Sreedhareeyam's case which inter - alia considered whether the product essentially intended to protect the health and also item 23 of the Rules of Interpretation excluded food supplement and tonic of any nature whereas the newly added proviso include medicament having subsidiary therapeutic or prophylactic use to be taxed only at 4% if manufactured under Drug License.

10. The applicant has also referred the judgment of the Apex Court in M/s. Reckitt Benckiser (India) Ltd. and has requested to clarify the rate of tax of the commodity.

11. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

12. Entry 36(7) of the Third Schedule to the Kerala Value Added Tax Act, 2003 is extracted hereunder:

36 *Drugs, Medicines and Bulk Drugs including Ayurvedic, Unani and Homeopathic medicine but excluding mosquito repellants and those specifically mentioned in the First Schedule and those notified under clause (d) of sub-section (1) of section 6.*

7 *Medicaments (excluding good of HSN headings Nos.3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.*

(e) Other

(i) Medicaments of Ayurvedic system

3003.90.11

13. In interpreting the said entry related to ayurvedic medicines, no single criteria can be adopted. At first the relevant entry in the Schedule is to be interpreted with the Rules of Interpretation of the Schedules to the Act.

14. Going by Note 23 to the Rules of Interpretation appended to the Kerala Value Added Tax Act, 2003, "*Entry 36 in Third Schedule does not include food or beverages such as dietetic, diabetic or fortified foods, food supplements, tonic beverages, aqueous distillates or aqueous solutions of essential oils suitable for medicinal use, soaps or other products containing added medicaments, and blood albumin not prepared for therapeutic or prophylactic uses.*"

15. The Rules of Interpretation and Chapter Notes to the Customs Tariff Act should also be looked into since the Schedules to the Kerala Value Added Tax Act is aligned with the Customs Tariff Act and as per the Rules of Interpretation to the Schedules of the Kerala Value Added Tax Act, those commodities which are given with HSN number should be given the same meaning as given in the Customs Tariff Act, 1975.

16. There exist a situation in the trade, whereby, taking advantage of the Entry 36 of the Third Schedule, primarily intended for medicines, many so called-medical products and cosmetics are flooding the market with the term '*ayurvedic/herbal/natural*' etc. suffixed or prefixed, claiming lesser rate of tax. It was particularly to avoid this situation and consequent revenue loss on this account, that the Government had made its intention clear in Para 191 of the Budget Speech 2007-2008 which reads '*A number of cosmetic items that would normally have been taxable at 12.5% are being taxed only at 4% because they are produced under a Drug License which permits them to claim the status of medicines taxable at 4%. It is proposed to plug this loophole by amending the schedule entry appropriately.* Subsequently, Entry 36 of the Third Schedule has been amended, specifying that similar goods notified under clause (d) of sub section (1) of section 6 shall be excluded from its purview with effect from 1/4/2007. The Government had also, in exercise of the powers conferred by Clause (d) of sub section (1) of Section 6 of the KVAT Act, 2003 made amendments to the SRO No.82/2006 vide SRO.No.119/2008.

17. A combination of factors has to be considered in its totality to arrive at a conclusion to the effect that whether the product is a drug, cosmetic or food supplement, like:-

- (i) Possession of a drug license under the Drugs and Cosmetics Act,
- (ii) The ingredients used, whether its prophylactic and therapeutic properties are only incidental to the product, and the specific condition it cures.
- (iii) Mentioning of the ingredients in ayurvedic texts, whether as a patent or proprietary medicine.
- (iv) Mode of presentation of the product to the market, i.e. whether as a drug or cosmetic or food supplement, including the packaging and advertisements i.e. whether as a drug or cosmetic or food supplement, and the target clientele.
- (v) Whether it is prescribed by the doctor.

18. Considering a single factor narrated above may not be sufficient, for example just for the fact of manufacture of an item under a license issued under the Drugs & Cosmetics Act, it cannot be termed as medicament, and it cannot be solely relied upon to clarify that the item is a medicine. The manufacturers of the products have a drug license issued to them by the Drug Control Authorities based upon the presence of certain constituents and certain subsidiary curative and prophylactic properties. While interpreting a fiscal statute the legislative intent is of paramount importance. Various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say, the meaning attached to them by those using the product. Ordinarily a medicine may be prescribed by a Medical Practitioner and it is used only for a limited time and not every day unless it is so prescribed to deal with a specific disease.

19. With these interpretational guidelines relevant in interpreting the entries, the contentions raised and the impugned product have been examined.

20. The applicant has presented the product Musli Power X-tra as a patented ayurvedic medicine and contended that it is used to treat sexual dysfunctions. Dysfunction may be due to different ailments in the reproductive system which is to be treated differently according to the specific symptoms. The applicant has not been able to prove as to exactly which disease the product is used to be cured. As it is meant to keep all sexual dysfunctions at bay, the commodity may be used for the general well being of the reproductive system, and it would be a health supplement only.

21. The mode of presentation of the product to the market is another criteria to be looked into. In *Naturalle Health Products (P) Ltd Vs. Collector of Central Excise, Hyderabad, 2003 (158) ELT 25 (SC)*, it was held that in case of ayurvedic medicines not having been defined in the Central Excise Tariff Act, 1985 the common parlance test would have to be resorted to find out whether a medicine is treated as an ayurvedic medicine by public. The applicant's claim in this matter deserves to be applied with the common parlance test. Definitely the common man identify the product Musli Power X-tra as a general health supplement for reproductive health. The applicant has not presented any evidence to prove otherwise. Advertisements in the print and visual media also create an impression that it is a supplement. Anybody can buy it without prescription. In common parlance, the customers purchase the product to improve their reproductive health and it is impractical to see that ailing patients go for this product for cure. Sick people would visit a doctor and go for prescribed medicines aimed at particular symptoms and ailment. The applicant tries to sell this product not only through medical stores but also through other shops. It shows their intention to sell it as a health supplement.

22. Whether the product is prescribed by a doctor is a matter of fact to be proved and applicant has not provided any evidence to support the claim. This would show that customers take it from the market as a supplement rather than a drug. The applicant has failed to prove any concrete medical uses aimed at curing any particular ailment with specific symptoms.

23. Sexual dysfunction is a general term for a condition which have physiological, psychological and psychosomatic causes which could affect both men and women. With regard to purely physiological causes, the treatment is different for both of them.

24. Hence, a drug to treat this condition should have specific identified action on the root cause of the condition. Evidence in this regard is lacking in this case. Moreover, the

marketing strategy of this drug suggest that it is for general sexual wellbeing which is not a disease condition.

25. Even though the above said product may have some therapeutic qualities, it is not enough to qualify the product as an ayurvedic medicine for the purpose of Kerala Value Added Tax Act, 2003. In view of the guideline 23 of the Rules of Interpretation of Schedules appended to the Act, there clearly exists a category of products which may be granted a Drug licence based on certain subsidiary curative or prophylactic value which however cannot be classified under Entry 36 of the Third Schedule despite having a Drug Licence.

26. Also the 12th proviso to Section 6(1) of the Kerala Value Added Tax Act, 2003, inserted by Kerala Finance Act, 2011 will not be applicable in this case, as the proviso is only applicable to 'ayurvedic cosmetic products'.

27. In view of the above said facts, it can safely be concluded that the commodity Musli Power X-tra cannot be classified as falling under Entry 36 of the Third Schedule to the Kerala Value Added Tax Act, 2003. None of the entries in any of the Schedules to Act is suitable for incorporating this commodity. Hence, it is clarified that the commodity Musli Power X-tra would be taxable at the rate of 13.5% by virtue of Entry 103 of S.R.O. No. 82/2006.

The issues raised above are clarified accordingly.

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O/o CCT

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Joint Commissioner (Law)
O/o CCT

S.K. Suchala Kumar
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To

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